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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

JAN 30 2003

File: EAC 00 150 52560

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

Identifying data deleted to
prevent disclosure of
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiernann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a company engaged in import and export activities with China and Hong Kong. It seeks to employ the beneficiary as its executive vice-president. Accordingly, it seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the Service erred in its finding of facts and application of law.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers.
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially provided a general overview of the beneficiary's job duties for the petitioner. The description included responsibilities for implementing corporate business, directing and coordinating import projects, guiding and coordinating two departments, directing marketing research, directing Chinese construction company's investment in the United States, budget allocation and control, reviewing and analyzing reports, determining and controlling projects between overseas companies and United States companies, directing subordinates and affiliate offices, and overseeing the day-to-day overall trading operation of the petitioner, and exercising personnel decisions.

The director requested a more detailed description of the beneficiary's duties in the United States, including all employees under the beneficiary's direction and a breakdown of the number of hours devoted to each of the duties on a weekly basis.

In response, the petitioner provided a breakdown of the hours the beneficiary would devote to her several duties. The petitioner stated that the beneficiary would be responsible for assisting the president for 5 hours, directing two departments for 7 hours, directing a supervisor and a manager for six hours, arranging administrative schedules for 3.5 hours, giving directions to salesman and supporting staff for six hours, acting as liaison with the offices overseas for 6 hours, reviewing and analyzing reports for 2.5 hours, preparing monthly reports for 1 hour, and exercising personnel decisions for 2 hours.

The director determined that the initial position description of the beneficiary's duties did not correspond to the position description submitted in response to the request for evidence. The director also determined that the petitioner's position description of the beneficiary's job duties was vague. The director further determined that the petitioner had not provided evidence that the beneficiary's subordinates held positions that were professional in nature and that the Service could not discern the actual day-to-day duties of the other managers and executives from their position descriptions. The director concluded that the petitioner had not established that the beneficiary would be employed in either a managerial or an executive capacity. The director also noted that the beneficiary had previously been granted an L-1A classification and stated that the L-1A petition had been approved in error.

On appeal, counsel for the petitioner asserts that the petitioner provided slightly different wording to describe the beneficiary's job duties in response to the director's request for evidence to better correspond to the allocation of the beneficiary's time. Counsel also asserts that even if the beneficiary does not supervise professional employees, although this point is not conceded, that the beneficiary manages the trade and business development function of the organization. Counsel further asserts that the beneficiary's duties include directing the trade and

business department of the organization and thus also qualifies as acting in an executive capacity.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). The petitioner has submitted confusing descriptions of the beneficiary's job duties. The most that can be discerned is that the beneficiary is involved in guiding, coordinating, or directing two of the petitioner's departments. In response to the request for evidence, the petitioner states the beneficiary spends 7 hours per week on this activity. On appeal, counsel states that the beneficiary is in fact managing or directing these two departments and that these two departments comprise an essential function of the petitioner. Neither counsel nor the petitioner further describes this purported function. Moreover, counsel has not supported the assertion that the beneficiary is managing or directing this "function" rather than providing the necessary services to perform the "function." The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). Further, based on the petitioner's representations the beneficiary does not spend the majority of her time involved in this activity.

In addition, the petitioner's job descriptions present a confusing picture of the beneficiary's supervisory duties. In the initial description the beneficiary's duties encompassed directing subordinates and affiliate offices and exercising personnel decisions such as hiring and firing employees. In response to the director's request for evidence, the petitioner indicated that the beneficiary's duties encompassed directing a supervisor and manager for 6 hours. The petitioner added that the beneficiary also gave directions to the salesmen and supporting staff, arranged administrative schedules, and made personnel decisions for an additional 11.5 hours of her week. It is not possible to glean from the confusing position descriptions provided that the beneficiary is controlling the work of other supervisory or managerial employees rather than primarily acting as a first-line supervisor over non-managerial, non-supervisory, and non-professional employees.

The Service is unable to determine from the rest of the broadly cast description whether the beneficiary is primarily performing managerial or executive duties with respect to activities such as assisting the president, reviewing and analyzing reports, and acting as a liaison, or is actually performing these activities. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church

Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988).

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are vague and general in nature and do not convey an understanding of what the beneficiary is doing on a daily basis. The record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not provided consistent documentation that it has a qualifying relationship with a foreign entity. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company. The petitioner was incorporated in January of 1997 in New York. The petitioner provided a copy of its share certificate issued to Sun Sun Construction, Inc, a company also incorporated in New York. The petitioner also provided a copy of filing receipt for Sun Sun Construction, Inc. indicating that it was incorporated in 1986. The petitioner further provides a chart showing that Sun Sun Construction, Inc. owns 100 percent of the petitioner and that Sun Sun Construction, Inc owns 70 percent of the Huizhou Mei Xin Car Repair Center, Inc located in China. The chart further shows that the Car Repair Center company owns 100 percent or operates as a branch office another concern identified as the Shunde Wada Plastic Factory. The beneficiary was allegedly employed at the Shunde Wada Plastic Factory from 1994 to 1997. The petitioner finally provides an approval certificate acknowledging foreign investment of 70 percent by Sun Sun Construction, Inc. in the Car Repair Center company. The petitioner alleges that this information supports a qualifying relationship between the petitioner and the beneficiary's former foreign employer.

The petitioner also provides Internal Revenue Service (IRS) Form 1120, U.S. Corporation Tax Return for both itself and its parent company. The petitioner provided an unsigned Form 1120 for the year 1999 in response to the request for evidence. At schedule K, line 5 the petitioner notes that it is a wholly-owned company and the accompanying statement identifying the petitioner's ownership indicates that Sun Sun Construction, Inc. is the 100 percent owner. The petitioner provides a second version of its

Form 1120 on appeal that shows at schedule K, line 5 and the accompanying statement that Shu Xin Liang owns 100 percent of the petitioner.

Ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and a foreign entity for purposes of this immigrant visa classification. Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988); Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986) (in non-immigrant proceedings); see also Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982). In the matter at hand, the petitioner has submitted inconsistent information regarding its ownership and control. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). In addition, the petitioner has not submitted sufficient documentation regarding the ownership and control of the foreign entity. The record is deficient in this regard. The petitioner has not established a qualifying relationship exists between the petitioner and a foreign entity in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company.

As the petition will be dismissed for the reason stated above, this issue is not examined further.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.